

IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY,

Employer,

and

Case No. 6-RC-12276

NEWSPAPER GUILD OF PITTSBURGH/
COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 38061, AFL-CIO, CLC

Petitioner.

AMICUS NATIONAL RIGHT TO WORK LEGAL DEFENSE & EDUCATION
FOUNDATION, INC.'S BRIEF IN SUPPORT OF POINT PARK
UNIVERSITY

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TABLE OF CONTENTS

	<i>page</i>
Table of Authorities	ii
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	2
I. Introduction	2
II. Universities Do Not Fit the Industrial Model of the NLRA. Therefore, Faculty Should in Most Cases Be Classified as Managers. Any Attempt to Weaken Their Status as Managers Is Contrary to the Holding of the U.S. Supreme Court in <i>Yeshiva</i>	3
III. As a Matter of Public Policy, Exclusive Representation of Faculty Is Harmful to the Mission and Identity of a University. It Creates the Likeli- hood of Divided Loyalties and Is a Threat Both to Academic Freedom and the Very Nature of a University	10
CONCLUSION	12

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Aboud v. Detroit Board of Education</i> , 431 U.S. 209	1
<i>Air Line Pilots Ass'n v. Miller</i> , 523 U.S. 866 (1998)	1
<i>Chicago Teachers Union, Local No. 1 v. Hudson</i> , 475 U.S. 292 (1986)	1
<i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988)	1
<i>Davenport v. WEA</i> , 551 U.S. 177 (2007)	1
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984)	1
<i>Knox v. SEIU</i> , ___ U.S. ___ No. 10-1121 slip op. (June 21, 2012)	1
<i>Lehnert v. Ferris Faculty Ass'n</i> , 500 U.S. 507 (1991)	1
<i>LeMoyne-Owen College v. NLRB</i> , 357 F.3d 55 (D.C. Cir. 2004)	2
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974)	4
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980)	<i>passim</i>
 <i>Statutes</i>	
National Labor Relations Act, 29 U.S.C. § 157	<i>passim</i>

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense and Education Foundation, Inc. (“Foundation”) is a nonprofit, charitable organization that provides free legal assistance to individuals who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

Attorneys provided by the Foundation have represented numerous individuals before the National Labor Relations Board (“NLRB” or “Board”) and in the courts, including representation in such landmark cases as *Knox v. SEIU* ___ U.S. ___, No 10-1121, slip op. (June 21, 2012); *Davenport v. WEA*, 551 U.S. 177 (2007); *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is aiding individuals who seek to limit their forced association with unions and their financial payments to those unions.

Amicus Foundation believes that any time individuals are forced to join, be represented by, or support a labor union, said compulsion impacts their constitutional rights. The impact is even more egregious for professors, since compulsory unionism impacts

academic freedom. In light of the above, the Foundation submits this brief in response to the Board's invitation to file *amicus* briefs in the above-captioned case.

ARGUMENT

I. INTRODUCTION

Universities and colleges (“universities”) are unique institutions, different from other employer-employee workplaces. Academic institutions, like most workplaces, have employees, managers, and professional employees. However, unlike other workplaces, universities have certain unique classes of individuals, to include students and professors. Individuals who work at universities, dissimilar to factory workers, cannot easily be pigeonholed into narrow classifications. But that is exactly what the Regional Director attempts to do in this case, and in so doing fails to apply the principles set-forth by the Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

The Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061 (“Union”) petitioned the NLRB to be the exclusive representative of the professors at Point Park University (“University”). The Region granted the petition and the University appealed. The U.S. Court of Appeals for the District of Columbia remanded the case to the Board, holding that the Board had failed to (1) apply the principles of *Yeshiva*, (2) to provide an adequate explanation of why its certification differed from previous rulings on certifications of university faculty, and (3) to apply the D.C. Circuit’s guidance set-forth in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004). On remand, the Regional

Director once again ruled in favor of the Union.

II. UNIVERSITIES DO NOT FIT THE INDUSTRIAL MODEL OF THE NLRA. THEREFORE, FACULTY SHOULD IN MOST CASES BE CLASSIFIED AS MANAGERS. ANY ATTEMPT TO WEAKEN THEIR STATUS AS MANAGERS IS CONTRARY TO THE HOLDING OF THE U.S. SUPREME COURT IN *YESHIVA*.

The Board posed eight questions (“Questions”) to potential *amici*.¹ The first three Questions address what the most significant criteria in determining the managerial status of

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- (1) Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?
 - (2) In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?
 - (3) Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?
 - (4) If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?
 - (5) Is the Board’s application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an in an academic context in a manner that remains consistent with the decision in *Yeshiva*?
 - (6) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?
 - (7) Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?
 - (8) As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty’s structure and practices?

faculty are under *Yeshiva*. The next five Questions ask whether other criteria should be considered beyond what *Yeshiva* and the appellate courts have applied in making that determination.

With respect to the first group of Questions, *Amicus* suggests that the Board focus both on those aspects of a university that make it unique and different from a factory floor and on the specific guidelines set-forth by the *Yeshiva* Court. The second set of Questions appear to be an attempt to establish new criteria that would permit the Board to evade the Court's holding in *Yeshiva*. Such an approach to evade or re-litigate *Yeshiva* should be abandoned. When determining whether faculty members are managers or statutory employees under the Act, the only change the Board should contemplate is the placement of greater emphasis on a university's unique nature and the unique role it plays in that structure. The Board should abandon the game played here by the Regional Director, where he looked at percentages of the University's acceptance of faculty recommendations, rather than look at the bigger picture, which amply demonstrates the real role faculty plays in helping to determine and implement policies at the University.

The Supreme Court incorporated two distinct but intertwined theories in deciding *Yeshiva*. First, it recognized the unique role universities play in Western society. Second, it applied to the *Yeshiva* faculty, the judicially created managerial exception to the National Labor Relations Act ("NLRA" or "Act"). *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Those two theories, along with *Yeshiva* itself, answer the Board's Questions.

Amicus Foundation addresses the Board’s Questions by discussing these three issues – the role of the university, the managerial exception, and *Yeshiva* – which, taken (as a whole), should form the Board’s basis in deciding this, as well as future, cases.

In evaluating cases that arise in academic settings, one must begin by evaluating the unique structure of universities and unique role their faculty play. The most important factor the Board must evaluate in deciding whether a university’s faculty members are or are not employees (even professional employees) under the Act is whether the university is a true university in its structure and design².

The *Yeshiva* Court took notice of the university’s evolution from medieval times and how principles of collegiality that developed in the Middle Ages still play a significant role in the modern university, 444 U.S. at 680-81. The Court focused on the fact that universities’ unique structure does not easily fit the industrial labor model upon which the Act and most Board decisions are premised. The Court forcefully and repeatedly made that clear: “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world,’” *id.* at 681 (quoting earlier Board decision), and the statutory scheme of the Act “does not square with the traditional authority structures which th[e] Act was designed to cope.” *Id.* at 680. Accordingly, that academic model, rather than an industrial model, must

² For instance, a trade school that calls itself a university and its instructors professors is not necessarily a “university”. If its “professors” have limited contracts, no academic freedom, no “faculty” in-put into school decision-making, and duties limited to merely regurgitating set lesson plans to its consumer “students,” the trade school would probably not be a true university. Thus, the courts’ admonition about accepting self-serving classifications when determining whether faculty are or are not managers is relevant. Those “faculty” would not likely fall into a managerial exception to the Act.

be the starting point for any analysis. If that were not the case, the Court would have forced Yeshiva's faculty into the industrial model and treated its faculty members the same as assembly line workers. Instead, the Court adopted a mechanism to remove the faculty at Yeshiva, and the faculty in most cases, from the Act. The Court did so by applying the judicially created managerial exception to the Yeshiva faculty.³ The Board should not now minimize *Yeshiva's* holding and attempt to squeeze a square peg into a round hole by turning managerial faculty into statutory employees.

What are the principles that the Court cited as important and emphasized in determining that Yeshiva's faculty was managerial? The Court looked to those aspects of the faculty that are unique to a university and, in essence, analogized them to managers in the industrial model. Those factors include faculty authority over curriculum, courses, scheduling, grading, measurement of student performance, teaching, tenure, as well as the role faculty plays in implementing a university's mission. None of those factors can individually be isolated from the total structure of the university and the faculty's relationship to that university. Each of them is a salient factor that the Board must look to in evaluating whether faculty members are managers or merely statutory employees. However, no factor stands alone as a make-it or break-it hurdle a university must clear to establish that its faculty members are managers.

³ That does not mean that all faculty necessarily falls under the managerial exemption. In some cases, professors may be supervisors – such as in the case of some deans or department heads. In other cases, they may be considered employees – most likely in trade-type colleges where the professors are hired without any expectation of tenure, teach a set lesson plan set-forth by the administration, and lack any pretense to academic freedom as described in footnote 2 above. Most professors, however, do not fall into those categories and are statutorily-exempt managers.

Furthermore, in each and every case it is irrelevant if the faculty members' desires are or are not adopted by the university, since they are "managers," and not owners or CEO's of the university. To the extent that the Act's industrial structure is analogous to a university's academic setting, faculty members are neither statutory employees nor supervisors. They serve the unique role of assisting the "owners," "CEO," or other employer in formulating and implementing the policies of the institution. They owe an undivided loyalty to the institution, not to a third party such as a labor union. However, managers do not run companies and faculty does not run universities. As the *Yeshiva* Court pointed out, "Ultimate authority is vested in a Board of Trustees." 444 U.S. at 675. Like managers in a typical industry, managers in an educational institution do not have binding agreements concerning their role in policy formulation. They do not have a final say in company policy and do not have a decision-making role that is established by contracts or collective bargaining agreements.

When the Court decided *Yeshiva*, it pointed out a number of indicia that were examples of managerial input at the university that demonstrated its faculty was managerial. In many of those instances, the Court pointed out that at that specific university the faculty decision-making in those areas had never or rarely been overridden. That, however, was illustrative of the facts at *Yeshiva*, and in no way set-down a marker that had to be achieved by every university in order for its faculty to be considered managers. Nothing in *Yeshiva* requires that faculty input be accepted carte-blanche by the "ultimate authority" in order to establish faculty as managers. That a university administration may exercise ultimate authority and veto faculty

decisions is irrelevant. *Yeshiva*'s holding is not premised upon whether every faculty decision or recommendation is accepted, but whether the faculty has substantial input in the decision of policy adoption. Although the Court found substantial areas wherein the faculty's decisions were routinely accepted, that was illustrative of the faculty role at Yeshiva. It was not a check-the-box requirement other universities must meet in order to have their faculty exempted as statutory employees.

Here, however, the Regional Director examines the University faculty's status as managers or employees through a lense that precludes different structures of university governance from that which existed at Yeshiva. The Regional Director requires rigid University acquiescence of nearly all faculty input and recommendations and points out times when faculty recommendations were not slavishly followed by the Point Park administration. For instance, the Regional Director finds it significant that in the area of developing college programs "the faculty does not have absolute effective control" (Regional Director's Order, p. 12). He then points out that of "six new graduate programs proposed since 2000, the Administration approved five of them," and thus the "faculty recommendation as to graduate programs was not followed nearly 17 percent of the time" (Regional Director's Order, p. 13). Certainly in an industrial setting, managers' recommendations are not always adopted. Similarly, it is irrelevant that faculty recommendations are not always adopted. There is no magic percentage of faculty recommendations that must be adopted in order to have the faculty classified as managers. What is key is that a structure exist that facilitates the faculty's input

in the decision-making process. It must be a real structure that gives the faculty a role in the governance of the University and not merely a Potemkin scheme to give the illusion of power. *Amicus* Foundation suggests that just as most managers' decisions in an industrial model are not accepted *carte blanche*, there should be no expectation that faculty recommendations be accepted *carte-blanche*. Many industrial managers would be thrilled to have 83% of their recommendations followed, as occurred in the instance complained about by the Regional Director.

The Regional Director also finds it significant that the University failed to follow the Faculty Handbook when it implemented certain academic changes (Regional Director's Order, p. 20). The Regional Director treats written University policies as though they are part of a collective bargaining agreement. He further treats deviations from those written policies as being equivalent to an unfair labor practice and grounds for transforming faculty managers into statutory employees who need the Act's protections. However, there is no reason to treat written policies as either *de facto* collective bargaining agreements or some sort of Biblical-like pronouncements whose deviation form the basis of crying heresy. Deviations from written university policies cannot transform a university into a shop floor and turn professors into statutory employees. While faculty input is a key component in determining whether faculty members are or are not managers, the fact that written guidelines about such input are not rigidly adhered to is irrelevant. If anything, the Regional Director's analysis demonstrates why faculty must be considered managers and not statutory employees. If the Faculty Handbook

were part of a collective bargaining agreement rather than a mere handbook, then the University would lack the freedom to implement decisions crucial to determining its policies. Even to allow faculty to bargain over such matters would inherently weaken the structure of the University and ultimately create the risk of divided loyalty that is inherently hostile to a managers', and more specifically faculty members', role at a university.

The sort of percentage tabulating conducted by the Regional Director, and his treatment of the Faculty Handbooks as sacrosanct contracts are irrelevant to determining if faculty are managers, and ignores the material input that University faculty has in the formulation of institutional policy. Perhaps even more important, the Regional Director's analysis minimizes the very real obligation faculty has to carry out the University's mission. As discussed below, an exclusive labor union would create a divided loyalty that would impact the faculty's responsibility to carry out the University mission with undivided loyalty.

III. AS A MATTER OF PUBLIC POLICY, EXCLUSIVE REPRESENTATION OF FACULTY IS HARMFUL TO THE MISSION AND IDENTITY OF A UNIVERSITY. IT CREATES THE LIKELIHOOD OF DIVIDED LOYALTIES AND IS A THREAT BOTH TO ACADEMIC FREEDOM AND THE VERY NATURE OF A UNIVERSITY.

Imposing an employee-employer industrial model upon faculty members would have a particularly egregious impact both on universities and their faculty, for both economic and non-economic reasons. A union acting as the exclusive representation of faculty creates conflicts for faculty loyalty to the university and its mission versus loyalty to the union. Unions take a host of positions on political and ideological issues. For example, a union may support abortion

rights for faculty. If the university is Catholic, the union will place faculty members in the position of supporting either the union or the university in its mission. In such an instance, the faculty members could be subject to union discipline for defying the union. Schools such as Grove City College or Hillsdale College, whose institutional missions preclude accepting government support, could find themselves confronted with a faculty union demand that the university seek and accept government aid in order to fatten the university budget for salaries, thereby forcing its faculty members to choose between loyalty to the university and loyalty to the union. In such a conflict, the solution of dissenting faculty members to exercise their Section 7 rights to quit the union to avoid union discipline is not always clear cut and simple, since resigning from the union forfeits the right to play any role in contract negotiations. In addition to the impact upon the individual faculty member, the university is faced with the situation where its faculty – i.e., managers – have a divided loyalty between the interests of the university and the union.

Too, the Board must weigh the negative impact exclusive bargaining will have upon the free speech and academic freedom of faculty members. One of the hallmarks of a university is respect for academic freedom, which includes freedom of speech and association. Exclusive representation will likely lead to forced unionism. That will certainly impact the faculty members' freedom of speech and association. One aspect of academic freedom is the right to pursue research and to teach without state control. The imposition of an exclusive bargaining agent upon a bargaining unit composed of faculty necessarily adversely impacts the faculty's

academic freedom.

Furthermore, the economic impact of exclusivity may weaken a university's mission. This economic impact is not limited to potentially crippling work rules and strike threats. One of the worst abuses of exclusive representation is the leveling downward of the best in favor of the group. In the industrial model that labor unions use in collective bargaining, employees are fungible – they receive the same wages adjusted for seniority, which results in the most productive workers receiving the same wages as those least productive. That occurrence would be particularly devastating in academia, where all professors are not equal and fungible in terms of their ability to command a salary and sell their services on the outside market. *Amicus* Foundation suggests that math, science and technical faculty often can individually bargain for higher salaries because their services in non-academic settings are more highly sought after, unlike many literature and history professors. The leveling of salaries in accord with an industrial model would impact a university's ability to attract competent professors in competitive professions.

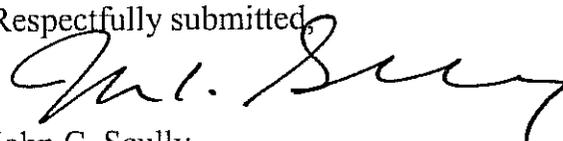
CONCLUSION

The Board should strictly adhere to the Supreme Court's recognition that faculty plays a unique role at universities. It should not expand the criteria laid down by the *Yeshiva* Court, but instead recognize the centrality of the Court's holding that university faculty does not fit into the industrial model for which the Act was designed. When evaluating the criteria used in determining whether faculty members are managers, the Board should follow to the Court's

holding. The issues most central to the *Yeshiva* holding include faculty authority over curriculum, courses, scheduling, grading, student performance, teaching, and tenure. However, not one of those criteria is absolute. Any given one could be absent, or not strictly adhered to. Just as a manager in the industrial model does not generally have final authority, in the academic model, no matter how much input faculty has, its power, as the Court recognized in *Yeshiva*, is not absolute.

Furthermore, the Board should give more consideration than it has in the past to the very real danger posed by a regime of exclusivity – i.e., the potential for creating divided loyalties between a unionized faculty and a university’s mission. Those divided loyalties exist both in the economic sense (the leveling down, discussed above) and in the potential conflict with a fundamental university mission, where the union’s ideological mission conflicts with that of the university (e.g., in the case of a pro-choice abortion union stance at a Catholic university).

Respectfully submitted,



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Dated this 6th day of July, 2012.

CERTIFICATE OF SERVICE

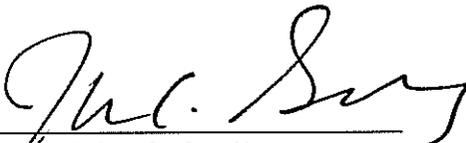
I hereby certify that on this 6th day of July 2012, I caused copies of the attached Brief in Support of Point Park University to be served by mailing copies thereof by U.S. mail, first-class, postage prepaid, to the following:

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